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Supreme Court of the United States

October Term, 1979

No. 79-74

STEVE STEVERS,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions presented herein were raised or could have been raised in the trial court; were raised on appeal to the Court of Appeals, Eighth Judicial District of Ohio; and were again raised in a Memorandum in Support Of Jurisdiction to the Supreme Court of Ohio.

The Ohio Courts decided all issues raised, or that could have been raised, in accordance with the statutes and Con-

stitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court.

There being no substantial federal question requiring a review by this Court, it is requested that the Petition for a Writ of Certiorari be denied.

COUNTER QUESTIONS OF LAW

The State of Ohio desires to state the issues presented in this case as follows:

1. Whether the admission of a statement by a seven year veteran police officer, who is a defendant, in a state criminal prosecution, is a violation of his constitutional privilege against self-incrimination embodied in the Fifth Amendment to the United States Constitution made applicable to state cases by the Fourteenth Amendment, where the accused police officer was not in custody or deprived of his freedom in that he was not requested to appear at the police station but rather appeared upon his own volition, and where *Miranda* warnings were subsequently given to him prior to his statement whereupon he expressed that he was already aware of these warnings.

2. Whether an accused, in a state criminal prosecution, is denied his constitutional privilege against self-incrimination embodied in the Fifth Amendment and his right to the assistance of counsel under the Sixth Amendment, both made applicable to the states via the Fourteenth Amendment, where there has been an explicit oral waiver by such person of the right to the presence of a lawyer and where the court found an intelligent, knowing and voluntary

waiver upon an examination of the totality of the circumstances and where, upon its examination of the state court record, these findings of fact were approved by the Court of Appeals as being supported by the record.

STATEMENT OF THE CASE

The petitioner, Steve Stevers, was indicted by the Cuyahoga County Grand Jury on May 28, 1976, and charged in a two count indictment with bribery (Ohio Revised Code, Section 2921.02) and intimidation (Ohio Revised Code, Section 2921.03). He was arraigned on June 2, 1976, and at that time, entered a plea of not guilty to the charges as set forth in the indictment. The case was assigned Case No. CR 26175 and ultimately set for trial in the courtroom of Judge Lucien Young. Trial commenced before a jury on March 21, 1977, and ended on March 28, 1977. On that same day the jury returned a verdict of not guilty of intimidation and guilty of bribery. The Court of Appeals for the Eighth Judicial District affirmed the trial court's decision on December 11, 1978. The Supreme Court of Ohio on April 12, 1979 dismissed petitioner's appeal for the reason that no substantial constitutional question was presented.

The events which provide the factual basis of the charges as set forth in the indictment took place on April 6, 1976. Those events, as described by the various witnesses during the course of trial were as follows:

In March of 1976, Mary Fockler Flynn testified before the Cuyahoga County Grand Jury and as a result, six members of the Hell's Angels motorcycle gang were indicted for rape, kidnapping and aggravated robbery. A few days later, on March 19, 1976, Mary Flynn was at a bar in the

University Circle area known as The Brick. Petitioner entered the bar and initiated a conversation with Mrs. Flynn and her friend Penny Walsh. After a short period of time, Patrolman Stevers invited Mrs. Flynn outside; she accompanied him and the following transpired:

> "A. He told me there might be some money in this for me and I asked, I asked him what he meant and he says the Hell's Angels might be willing to settle this and by paying me off, and I said how much or something like that. He said, '$10,000.00 maybe.'
>
> And at that point he gave me his telephone number and his brother's telephone number and told me that I could get in touch with them there, with him either at his brother's or with him at his phone number." (R. 213)

Petitioner met this witness again on the following evening at the same bar. He asked her if she had made a decision and said that he would be in touch with her.

The next day, Mrs. Flynn contacted Jean Van Atta, a volunteer with the Rape Crisis Center. The witness was ultimately put in contact with the Internal Affairs Unit of the Cleveland Police Department. On March 25, 1977, Mrs. Flynn called petitioner from the Office of the Internal Affairs Unit and spoke about his pending offer during which the following was said:

> "Hello.
> Is Steve there?
> Uh?
> Is Steve there?
> Ya—this is Steve.
> You the cop?
> Who?
> The Cop?

> Ya.
> Ya, this is Mary.
> Mary who?
> The girl from The Brick.
> Oh -Oh -Oh!
> So what's going on—anything?
> No. Nothing.
> Nothing?
> Not a thing.
> Is that right?
> They figure they handle it themselves.
> Hmm
> So then there's nothing going on then?
> Not a thing.
> Oh, well did they say how they were going to handle it themselves?
> No.
> Well, I got a good idea.
> What's a good idea? Fill me in.
> Uh?
> Fill me in.
> Well, I don't know. I'm just speculating. They said they could handle it though.
> Oh Ya. What, are they gonna—you know—split through the trial, or try to get me?
> I have know idea what they are gonna do. (sic)
> Hmm
> I have know idea, I didn't ask them. I don't want to know. (sic)
> But they said they handle it and that be it I guess.
> Hmm
> You do what you got to do.
> O.K. then.
> They said that's to steep a price. (sic)
> Hmm

So, I don't know what to tell you.

Do you they negotiate anything lower?

All I can do is ask them.

Hmm Hmm

If you want me to ask them, I'll ask them?

Ya, You can ask them for me.

Alright. I still got your number here, let me look. It's lying right here I think - It's 791-7627 Right?

Hmm—Hmm

Number 320. O.K. I'll get back to you I probably won't see him until probably tomorrow.

Which guy you doing it through?

I'm just talking to different people. It's irrelevant of whose names in there—you have it—Right?

Ya—Really!

You know nobody even knows that I even talked to you.

Ya—Really.

Is far as they know, I know some people that know some people. (sic)

Hmm—Hmm

Ans as far as you know—I know some people who know some people. (sic)

Right.

Ya see I just want to get out of here.

Uh?

I just want to get out of here, You know.

Oh, I can dig it, I know what you mean—sure.

I don't want to stick around for any of this bullshit.

Alright, I'll get back to you.

Alright.

Maybe not 'til, Shit I won't get back 'til Monday. I am going away for the weekend.

Hmm—Hmm

I'll tell you what—I'll call you Monday for sure.

O.K. Monday.

Ya, if it's bad news, it's bad news. And if it's good news—I'll call you for sure—I won't leave you standing.

O.K.

Alright?

Alright.

At that number right?

Hmm—Hmm

Sometime Monday during the day time, 'cause I'll be gone Saturday and Sunday.

Alright.

Monday during the daytime then.

Ya—like I said I'll call ya—if they can No the hell with it, well, that's what I call and tell you. Alright? (sic)

Alright.

O.K.?

O.K. Talk to you then—Bye."

Approximately a week and a half later, Stevers called the witness late in the afternoon and told her to sit still he had something in the wind and he would get back to her (R. 283).

On April 6, 1977, Steve Stevers again called Mrs. Flynn in the morning and asked her to meet him at The Brick at 2:30 that afternoon. The meeting took place at the requested time and petitioner and the witness walked from Euclid Avenue up Mayfield Road. During that time, Robert Alberty, a University Circle Policeman stopped his car and asked Mrs. Flynn if she was all right and on learning that she was, he pulled away. Shortly afterward, two other men arrived: One was identified as Clarence Crouch, and the other was merely referred to as George. Petitioner

showed her the money which was loosely folded, and she was told that it amounted to $1,000.00.

> "He . . . told me that they could easily give the $1,000.00 to some nigger off the street and have him wipe me out, and he said 'You are leaving today,' and I don't recall what else was said, but the other man by the name of George told me I better not come back." (R. 292).

Mrs. Flynn was allowed to go back to her residence. She was picked up in fifteen minutes by petitioner who had his son with him. The son was taken to Stevers' ex-wife, Mary Lou Stevers, at Sterling Brass, 9600 St. Catherine. Continuing the ride to the airport, petitioner told Mrs. Flynn that he was getting a new sportster out of this deal (R. 297). He further related that "he had grown up with the Hell's Angels a couple of them . . . but they went their way and he went his." (R.297).

They arrived at the airport at approximately 5:00 p.m. It had earlier been determined that the witness and her dog would fly to Denver. At the United Airlines ticket counter, Stevers purchased the ticket and signed various receipts, and the airlines located an extra large kennel for Mrs. Flynn's dog. The money, $1,000.00 in $100.00 bills, was turned over to Mrs. Flynn at that time. The name Joann Wilkinson was used on the tickets and receipts which were identified as State's Exhibits 10-A through 10-F. The defense stipulated that appellant signed the receipt identified as State's Exhibits 10-D and 10-E and also that appellant wrote on State's Exhibit No. 1, a yellow sheet of paper with appellant's phone number which had been turned over to Mrs. Flynn by Stevers on the first contact made at The Brick on March 19, 1976 (R. 601).

On the way up to the security gate, petitioner had to turn his gun over to a guard at the security desk and as they proceeded towards the gate he stated to the witness "that's all right I still have my knife." (R. 309). At the boarding gate prior to Mrs. Flynn's departure, petitioner said to her "No hard feelings, kid, but I hope I never see your face." (R. 310).

Mrs. Flynn flew into Denver, stayed only one day, purchased an automobile, and drove back to Cleveland and on to Akron where she lived with her brother. She was ultimately contacted by members of the Cleveland Police Internal Affairs Unit.

Judith Dunlap, an employee of United Airlines for seven and a half years, identified the tickets (State's Exhibits 10-A through 10-E) purchased by petitioner for Mrs. Flynn, and that the date of the purchase was April 6, 1976 (R. 437).

Penny Walsh, a student and friend of Mrs. Flynn, identified petitioner as being in The Brick Bar on March 19, 1976, and going outside with Mrs. Flynn for a short period of time. She learned that petitioner had offered money to Mrs. Flynn to drop charges against the Hell's Angels (R. 448). The next evening she saw Mrs. Flynn once again talk to him.

Patrolman Alberty, an employee of the University Circle Police Department for fourteen years, testified that he saw Mrs. Flynn with Steve Stevers on Mayfield at 115th on the afternoon of April 6, 1976, at approximately 3:30 p.m. (R. 461).

Norman Laflame, President of Sterling Brass located at 9600 St. Catherine, identified photographs of his building. He further related that Mary Lou Stevers was working on April 6, 1976 from 8:30 until 4:30 p.m. at the plant (R. 483).

Detective Bennett, a Cleveland Policeman for twenty-eight years, described his investigation of the case, including the interview of petitioner on May 25, 1976. During this interview Stevers denied knowing Mary Fockler Flynn (R. 519).

James Duchin, an employee of University Hospital and a friend of Penny Walsh and Mary Fockler Flynn, stated that he was with these girls at The Brick on March 19 or 20, 1976, and at one point there was conversation about a bribe but he couldn't describe specifically when this occurred (R. 562).

Lieutenant Janero, the Officer in charge of the Internal Security Unit, testified to his part in the investigation. He was present on March 25, 1976, when the phone call was made by Mary Fockler Flynn to appellant from the police station. Lt. Janero was able to identify Stevers' voice (R. 572).

The defense presented two witnesses, Mary Lou Stevers and Steve Stevers.

Mary Lou Stevers testified that sometime in early April appellant stopped by her place of employment, Sterling Brass, and dropped off their young son in the afternoon (R. 607).

Steve Stevers testified that he met Mary Fockler who whom he knew as Joann Wilkinson at The Brick on March 19, 1976 and March 20, 1976. He admitted the yellow sheet of paper with the number on it was in his writing. He also admitted that he spoke with the witness on the phone on March 25, 1976, but the conversation had nothing to do with bribery to drop the charges against the Hell's Angels. He admitted that he took her to the airport on April 6, 1976 and signed the receipts but he denied paying for the ticket or turning $1,000.00 over to the witness.

He admitted that he lied in the May 25, 1976, interview with the police about being at The Brick, meeting a girl there, and taking this girl to the airport.

REASONS FOR DENYING THE WRIT

1. Whether the admission of a statement by a seven year veteran police officer, who is a defendant in a state criminal prosecution, is a violation of his constitutional privilege against self-incrimination embodied in the Fifth Amendment to the United States Constitution made applicable to state cases by the Fourteenth Amendment, where the accused police officer was not in custody or deprived of his freedom in that he was not requested to appear at the police station but rather appeared upon his own volition, and where Miranda warnings were subsequently given to him prior to his statement whereupon he expresed that he was already aware of these warnings.

On May 26, 1976, the investigating detectives in the case at bar ordered petitioner's brother, Dennis Stevers, and his partner, John Simsic, to appear at their office in the Amstead Building.

Petitioner's presence was not requested, yet he made an appearance at the Office of Internal Affairs that morning. Petitioner in his own testimony stated he was *invited*, not ordered, into the interview room and that he went into the room voluntarily (R. 682). Also present during his interview was his brother and three members of the Internal Affairs Unit. Initially the following transpired between Lt. Janero and Steve Stevers:

> ". . . could I take your gun.
> Oh oh.

I'd, I'd just feel better.

Oh, okay, I understand that.

(unintelligible)

We've got a definite problem.

Okay.

Look, we're involved in investigating a felony. Your involved in the (unintelligible) (sic)

A felony.

. . . in a felony. A bribery case. We've got to advise you right off the bat. We talked to your brother. He hasn't said much of anything. He was advised that you have a right to an attorney. The rights that you know of. Do you want me to read them to you?

No, I understand them. I know them but I can't give them to you.

You have a right to an attorney. . .

I know.

Anything you say can be held against you. Have you read your rights?

I know em. I know em.

. . . We are going over some basic information here. . . . you live with your brother.

Yeah, off and on, like sometimes I feel like (unintelligible)

Will you give us your ex-wife's address, please.

Yeah, 304 (unintelligible)

Where's that?

Willowick.

I've got to advise you of your rights right off the bat. If you don't want to talk to us without an attorney, that's fine. If you'd like to go ahead with whatever we're going to talk about, we'll go ahead. If you want to stop at any time, you can stop.

Okay, yeah, go ahead."

The court listened to the testimony from both sides and further learned that Steve Stevers had been a police officer for seven years and carried a *Miranda* Warnings card, and that during his time with the Cleveland Police Department he had made over one hundred arrests (R. 147).

The questions presented in this Question of Law are threefold: (1) Was Steve Stevers in custody so as to necessitate communicating the *Miranda Warnings?* (2) Were the *Miranda* Warnings properly communicated, given appellant's background and police experience? and (3) Did appellant waive these rights by his answer at the inception of the interview?

The custody question is one involving many questions. In examining the facts in the case at bar, one cannot help but agree with the presiding judge that petitioner was in fact not in custody at the time of the interview.

The fact that the interview took place in a police station should have little bearing on this question since petitioner was a police officer with seven years experience. In *People v. Williams,* 290 N.Y.S.2d 321 (1968), the defendant was also an experienced police officer, trained to investigate and interrogate. The court found that the station house was the natural habitat of the defendant. In the case at bar, the Amstead Building housed police officers. Steve Stevers chose to go there, and was familiar with, and not intimidated by these police officers.

There was no indication in this case of restraint of petitioner by the detective. There were no searches, booking procedures or handcuffs. On the contrary, petitioner was urged to return the following day with his attorney. Petitioner was allowed to leave without restraint.

In *Miranda v. Arizona*, 384 U.S. 444 (1966) this Court describes custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Supra*, at 444).

In *Oregon v. Mathiason*, 429 U.S. 492 (1977) decided by the United States Supreme Court in January of 1977, the court described the voluntary nature of an interview which occurs in a police station between police officer and civilian. In *Mathiason*, the defendant voluntarily met the police officer at the station at his request and was allowed to leave shortly after the interview. The court stated, "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."

While the interview in the case at bar may be termed coercive it was certainly not of a custodial nature.

Secondly, the warnings were given although they were not necessary. Lt. Janero told petitioner that he had the right to have an attorney, anything he said could be held against him, he didn't have to talk without an attorney, and he could stop the questioning at any time. These questions coupled with petitioner's police experience would certainly comply with the precepts of the *Miranda* decision that a suspect know these rights.

Thirdly, appellant waived his rights by his responses to Lt. Janero. Referring to the *Miranda* warnings he stated, "No, I understand them. I know them but I can't give them to you. I know. I know em. I know em. Okay, yeah, go ahead."

Contrast that scenario with the facts described in *North Carolina v. Butler*, ... U.S. ....., 60 L. Ed. 2d 268 (1979) where petitioner had the equivalent of an eleventh grade education and after being advised of his rights refused to sign a waiver provision but said he would talk to the F.B.I. agents. The Court ruled that the statement was admissible even though there was an absence of the explicit waiver of the right to counsel. Also on the question of waiver see *Fare v. Michael*, ... U.S. ....., 47 L.W. 4771 (1979).

Certainly Lt. Janero could not be expected to go through a useless exercise where appellant kept telling him he knew his rights. His words clearly show a waiver on the part of appellant.

2. Whether an accused, in a state criminal prosecution, is denied his constitutional privilege against self-incrimination embodied in the Fifth Amendment and his right to assistance of counsel under the Sixth Amendment, both made applicable to the states via the Fourteenth Amendment, where there has been an explicit oral waiver by such person of the right to the presence of a lawyer and where the trial court found an intelligent, knowing and voluntary waiver upon an examination of the totality of the circumstances and where, upon its examination of the state court record, these findings of fact were approved by the Court of Appeals as being supported by the record.

The question of whether petitioner voluntarily spoke with the police should be answered by the tape of the interview. Steve Stevers repeatedly encouraged the detective to continue the questioning, beginning with

"Lt. Janero: I've got to advise you of your rights right off the bat. If you don't want to talk to us

without an attorney, that's fine. If you'd like to go ahead with whatever we're going to talk about, we'll go ahead. If you want to stop at anytime you can stop.

Stevers: Okay, yeah, go ahead." (Page 1, State's Exhibit 1.)

The detective questioned Stevers, who could have stopped the questioning at any time. He chose to continue. The detective even told Stevers when he might be saying too much and they warned him to stop (Page 26, State's Exhibit 1). In *Spano v. New York,* 360 U.S. 315 (1959), a case cited by petitioner, the suspect was interrogated by fourteen different people during an eight hour period of time ending in the early hours of the morning. Contrast that with the case at bar where petitioner was a veteran police officer with seven years of police experience; he voluntarily appeared at the police station on the morning in question; he accepted the invitation of the detectives to speak with them, and was told he could stop at any time. He did ultimately leave and was asked to come back the next day with his attorney. Petitioner's activities and statement can only be seen as voluntary as evidenced by his own words (Page 25, State's Exhibit 1):

"And I'm not going to sit here and admit to anything myself. You know that as well as I do."

It is obvious from the above-mentioned material that Patrolman Stevers was treated very fairly by the investigating detectives; that he was in no way coerced into remaining for the interview, nor in any way forced to make a statement during the interview.

CONCLUSION

The decision of the appellate court does not conflict with the decisions of this Court or the decisions of other circuit courts.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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